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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 534

ANTHONY A. CEFARATTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

B. Dabney Fox,
1901 Eleventh Street, N. W.
Washington, D. C.
William Beasley Harris,
1901 Eleventh Street, N. W.
Washington, D. C.
Counsel for Petitioner.

Curtis P. Mitchell,
1901 Eleventh Street, N. W.,
Washington, D. C.
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 534

ANTHONY CEFARATTI,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, Anthony A. Cefaratti, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the District Court for the District of Columbia granting petitioner's motion for the suppression of evidence and remanding the cause to the District Court so that the United States may reindict the petitioner.

Opinions Below

The opinion of the Court of Appeals on respondent's appeal is not yet reported, but can be found in Record 15, et seq.

Jurisdiction

The judgment of the Court of Appeals was entered on November 6, 1952 (R. 25). The jurisdiction of this Court is invoked under Title 28, United States Code, 1254(1).

Questions Presented

1. Whether, after indictment, the United States, in a criminal case, has a right of appeal from an order of suppression of evidence under Title 23, Section 105 of the District of Columbia Code, 1940 Edition, or Title 28, Section 1291 of the United States Code when it dismisses with leave of court the two counts of the indictment to which the order of suppression relates and proceeds to trial on the remaining counts of the indictment, which results in a verdict of not guilty on the remaining counts.

2. Whether a search is legal and lawful when a police officer who sees a person (vendor) sell, give and/or deliver narcotics to a person (vendee) on September 21, 1950, and who has such person (vendee) arrange to purchase additional narcotics from him on September 23, 1950 at an agreed time and place and upon the arrival at the agreed time and place, the alleged vendor is placed under arrest, his person searched and no narcotics found thereon and, upon disclosing the tag number of his automobile, the officer searches it without a warrant.

3. Does a motion setting forth a right of possession in the following terms satisfactorily meet the requirement of a right of possession or ownership of the property seized?

> "1. That on to wit: September 23, 1950 defendant was possessed of a certain motor vehicle commonly known as an automobile, and was in the District of Columbia when he was subjected to an illegal search and seizure in violation of his Constitutional rights.
>
> "2. That there was no warrant issued permitting such search and seizure."

Statutes Involved

District of Columbia Code—1940 Edition

§23-105 [6:355]. Appeals by United States and District of Columbia.

In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions; Provided, That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside. (Mar. 3, 1901, 31 Stat. 1341, ch. 854, §935.)

District of Columbia Code—1940 Edition

§17-102 [16:27]. Court of Appeals—Appeals from interlocutory orders in criminal case prohibited.

Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain any such appeal heretofore or hereafter allowed or taken. (July 3, 1926, 44 Stat. 831, ch. 755.)

United States Code

§28-1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code

§28-1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing,

modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

United States Code

§18-3731. Appeal by United States.

An appeal may be taken by and on behalf of the United States from the District courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently presented.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. As amended May 24, 1949, c. 139 §58, 63 Stat. 97.

Federal Rules of Criminal Procedure, Rule 41(e).

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision

of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

UNITED STATES CONSTITUTION

FOURTH AMENDMENT TO THE CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE CONSTITUTION:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statement

Petitioner was arrested on September 23, 1950 and was indicted on October 16, 1950, for a violation of the Federal Narcotics Law (United States Code) Title 21, Section 174, Title 26, Sections 2553(a) and 2554(a). The first two

counts of the indictment charged a sale and concealment of twenty five capsules of heroin on September 21, 1950. In the last two counts, he was charged with the purchase and concealment of ninety capsules of heroin on September 23, 1950.

The facts leading to petitioner's arrest on September 23, 1950 as adduced at the hearing on the motion to suppress the evidence filed under Rule 41(e) of the Federal Rules of Criminal Procedure and based upon the fourth and fifth amendments to the Constitution of the United States, are as follows:

On September 21, 1950, Officer Joseph A. Gabrys of the Washington Metropolitan Police Department observed from the second floor of the Austin-Reynolds Printing Company which is at the rear of 1318 Twelfth Street, Northwest, a meeting in the rear of 1315 Thirteenth Street, Northwest, between one Harold Hallams, the informer named as the vendee in the first count of the indictment, and the petitioner Cefaratti. At that time he (Gabrys) witnessed a sale between the two which turned out to be heroin. There is no evidence that either Gabrys or Hallams knew the name of the defendant at the time of the sale of September 21 (R. 6). Pursuant to instruction from the Narcotics Squad, Hallams made arrangements to meet the same man, identified by name as Cefaratti after his arrest, at a specified hour on the Northwest corner of Thirteenth and "M" Streets, Northwest, on September 23, 1950, and to buy from him some narcotic drugs (R. 6, 7). This communication Hallams communicated to Gabrys (R. 6, 7). Hallams also had informed Gabrys that the man from whom he had made a purchase owned a cab (R. 8-9).

Accordingly, at the "arranged time" on September 23, 1950, Hallams was stationed on the Northwest corner (R. 8). Hallams met the petitioner at the "arranged time and place", but did not purchase the narcotics because the police had not given him any money inasmuch as they (the

police) intended to arrest the petitioner at this time. The petitioner was arrested in front of 1216 Thirteenth Street, Northwest, Washington, D. C. (R. 6), and searched. Upon learning the tag number of petitioner's car, some other officers found the car at or near Fourteenth Street and Thomas Circle, Northwest, and searched it, removing therefrom some papers and narcotics (R. 6). Officer Gabrys further testified that he searched the car when it was brought to the Police Headquarters (R. 6).

The trial court granted the motion to suppress on November 10, 1950, but did not order the return of the property (R. 10). The Respondent filed a Motion for Reconsideration on November 15, 1950 (R. 13), which was denied without argument on December 1, 1950 (R. 14). On December 7, 1950, the Respondent dismissed counts three and four of the indictment (R. 14), and appealed to the United States Court of Appeals for the District of Columbia Circuit from the order suppressing the evidence. The Court of Appeals reversed the order of the District Court on November 6, 1952, treating the appeal by the United States as an appeal from an order to suppress before indictment (R. 20-21).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that 28 United States Code 1291 or 23 District of Columbia Code (1940 Edition) 105 affords the United States a right of appeal from an order of suppression in a criminal case after indictment when it dismisses the two counts of the indictment to which the order of suppression relates and proceeds to trial on the remaining counts of the indictment, which results in a verdict of not guilty.

2. In holding that a search of petitioner's automobile was lawful where petitioner was arrested without a warrant, his person searched, and upon disclosing the tag number

of his automobile, the automobile which was several blocks away, was searched without a search warrant and certain objects taken therefrom.

3. In holding that since it agreed with Government's other contentions it need not consider (what it termed a somewhat technical point) the contention of the Government that the petitioner did not claim any interest in the automobile and therefore could not complain of the search and seizure; thus ignoring the total atmosphere of the case.

Reasons for Allowance of the Writ

This Court has never expressly determined whether the United States has a right of appeal from the granting of an order of suppression of evidence in a criminal case, after indictment, where the United States dismisses that portion of the indictment to which the order of suppression of evidence relates. This question is one of great importance to the administration of justice in the federal courts, and there is considerable confusion and uncertainty in federal courts.

Title 28, (Supp. V) Section 1291 of the United States Code provides, as did its predecessors, that "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

Title 28, Section 1292 also appears to allow appeals from interlocutory orders, decrees and judgments in certain types of cases. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, this Court in discussing 28 U. S. C. 1948 ed. 1291 and 1292 said at 546:

> ". . . The Court has long given this provision of the statute practical rather than a technical construction," *Bank of Columbia* v. *Sweeney*, 1 Pet. (U. S.) 567, 569, 7 L. Ed. 265, 266; *United States* v. *River Rouge*

Improv. Co., 269 U. S. 411, 414, 70 L. Ed. 339, 343, 46 S. Ct. 144; *Cobbledick* v. *United States*, 309 U. S. 323, 328, 84 L. Ed. 783, 786, 60 S. Ct. 540.

In *Janitz* v. *United States*, 161 F. 2d 19 (C. A. 3), the Court of Appeals for the Third Circuit held that the United States' right of appeal, if any, must be based upon a right given in the statute. This appeal was taken by the United States from an order of dismissal entered by the district court after an order of suppression of evidence had been granted. This dismissal arose because the Government acknowledged that it could not establish the charges because the use of the evidence had been suppressed. In dismissing the appeal for want of jurisdiction the Court of Appeals for the Third Circuit held that the Criminal Appeals Act, Title 18 United States Code 3731 (1949) did not provide for an appeal by the United States in these circumstances.

In the case at bar, the United States does not contend that the order of the district court is appealable under the Criminal Appeals Act, 18 U. S. C. § 3731 (1949). Its (the United States') argument here is much broader and much more refined, although the factual situations are parallel with one exception. In the *Janitz* case, the court denied the defendant's motion for a judgment of acquittal, and entered an order of dismissal. Here, when the case was called for trial, the United States dismissed Counts 3 and 4 of the indictment because it had no evidence (R. 10) and proceeded to trial on counts 1 and 2 upon which the defendant-petitioner was found not guilty. Now, the United States seeks to set aside the order of suppression, and the Court of Appeals so held, so that it may go behind the order of dismissal by re-indicting the defendant-petitioner. Surely this results in splitting the case into two parts and thus necessitates two trials. In *Cobbledick* v. *United States*,

309 U. S. 323 Mr. Justice Frankfurter, speaking for the Court, at page 326, said:

> "In thus denying to the appellate courts the power to review rulings at nisi prius, generally, until after the entire controversy has been concluded, Congress sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality the idea underlying "final judgments and decrees" in the Judiciary Act of 1709 and now expressed by "final decisions" in § 128 of the Judicial Code—it is not a technical concept of temporal or physical termination. It is the means of achieving a healthy legal system. As an instrument of such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding. *Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . ."* (Emphasis Supplied)

Mr. Justice Frankfurter's observations in the *Cobbledick* case while applicable to defendants in criminal cases are likewise peculiarly applicable to appeals prosecuted by the United States in criminal cases after indictment. Here, unlike *Perlman* v. *United States*, 247 U. S. 7, 62 L. Ed. 950, 38 S. Ct. 417, and *Burdeau* v. *McDowell*, 256 U. S. 465, 63 L. Ed. 1048, 41 S. Ct. 574, which were independent petitions for suppression filed before indictment, here the petitioner was under indictment at the time the notice of appeal was filed. And even though that portion of the indictment which remained resulted in a favorable verdict for the petitioner, it would not appear to improve the Government's position on appeal.

It is difficult to conceive how one criminal proceeding became two upon the granting of the order of suppression

of evidence. Thus, it would appear that the United States was both the prosecutor in one half of the case and the appellant in one half of the case at the same time. Surely this presents a shocking example of piece-meal litigation at the very least.

Title 18, Section 3731 of the United States Code (1949), the Criminal Appeals Act, provides for appeals by the Government in certain classes of decisions. As Mr. Chief Judge Stephens observed in his dissenting opinion in the case at bar:

> "It is without dispute that the appeal cannot be taken under the Criminal appeals act, 18 U. S. C. Title 3731 (1949), for the reasons that the order granting the motion to suppress is not within the classes of decisions or judgments made appealable by the Government to the courts of appeals by that section; it is not a decision or judgment setting aside or dismissing an indictment or information and it is not a decision arresting a judgment of conviction."

While an appeal from an order granting a motion to suppress in a criminal case is neither specially nor by implication included within the ambit of 18 U. S. C. 3731, the United States now seeks to read 28 U. S. C. 1291 and/or 28 U. S. C. 1292 as a gloss upon 18 U. S. C. 3731. In the *Janitz* case Mr. Judge Goodrich at page 21 observed:

> "We bear in mind the undisputed proposition that the Government's appeal must be based upon a right given in the statute if it is to have one. Was the District Court order a 'judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment'? We think it clear from the recital of the facts already set out that the learned Judge's order of dismissal was not based on any objection brought against the indictment at all. The Government's case failed because it had no testimony to support it. We think that this is not the kind of judgment to which the Criminal Appeals Statute is directed."

> ". . . The unsuccessful termination of the prosecution's case against the defendants in this instance because the Government had no evidence on which they could be convicted has nothing to do with a plea in abatement. We do not see, therefore, any possibility that this appeal can come within the language of the Criminal Appeals Act and the available legislative history cited to us on behalf of the Government is we think, too unconvincing to require discussion. The appeal is dismissed for want of jurisdiction."

However, the respondent apparently concedes that the appeals allowed the Government under Title 18, Section 3731, U. S. C. are not available to the instant case and argues that Title 23, Section 105, D. C. Code (1940) has not been repealed by any subsequent statutory enactment and that this local statute confers, in the District of Columbia, a right of appeal by the Government in criminal prosecutions which is broader than that existing in other jurisdictions pursuant to Title 28, Section 1291, U. S. C., and Title 18, Section 3731, U. S. C. Assuming for purposes of this discussion, this much of the Government's argument, the remaining contention that this broader right of appeal by the Government permits this Court to review an order of suppression is absolutely without foundation or basis in Title 23, Section 105, D. C. Code (1940) or any reasonable interpretation thereof.

According to the plain language of Title 23, Section 105, the Government "shall have the same right of appeal that is given to the defendant." A fortiori, the Government cannot appeal from an order of suppression unless the defendant can appeal from an order denying suppression. Obviously, the defendant in a criminal case has no such right unless "his guilt as a matter of fact and law" has been submitted to the Court. *Knott* v. *U. S.*, (C. C. A. 5th Cir., October 23, 1947) 163 F. 2d 983. How then can the Government claim such right when, by dismissing the

charge before trial, as it alleges, it has specifically refrained from submitting defendant's guilt, as a matter of fact and law to the Court.

The Government can claim no escape from this conclusion under Title 23, Section 105, on the ground that the order of suppression necessitated the dismissal because there was no other evidence. Certainly neither the trial court nor this court is responsible for the quantum of evidence available to the Government in a criminal prosecution and where, as here, certain evidence has been determined to be inadmissible, there is no limitation upon or bar to the Government's producing other and competent evidence if such there is. A defendant who is aggrieved by a trial court's ruling upon the admissibility of certain evidence may not, as the Government seeks to do herein, withdraw from the Court a determination of his guilt, as a matter of fact and law, and appeal to this Court from the allegedly erroneous ruling upon the evidentiary question. The defendant's appeal in such instance must be predicated upon a verdict and judgment of his guilt, in which appeal he may assign the erroneous ruling as grounds therefor. Significantly, however, the Government is precluded from an appeal in such case by the very statute on which it seeks to rely.

Title 23, Section 105, D. C. Code (1940) includes the specific proviso "That if on such appeal it shall be found that there was error in the rulings of a court during a trial, a verdict in favor of the defendant shall not be set aside." The effect of this proviso in the statute has been consistently construed in this jurisdiction in the manner most recently stated in *United States* v. *William B. Martin,* (Municipal Court of Appeals No. 1050. Decided June 15, 1951):

> "Under the interpretations of the statute permitting appeals by the United States and the District of Columbia in criminal prosecutions (Code 1940, §23-105) it has been held repeatedly [citing *United States* v.

Evans, 30 App. D.C. 58, cert. quashed 218 U.S. 97, 53 L. Ed. 803, 29 Sup. Ct. 507; *District of Columbia* v. *Burns,* 32 App. D. C. 203; *District of Columbia* v. *Kendall,* 57 App. D. C. 271, 20 F. 2d 287], where the guilt of defendant, as a matter of law and fact is submitted to the court, an appeal by the Government is not permitted because the defendant cannot be retried for the same offense and therefore even if the ruling of the trial court were found to be erroneous the judgment could not be vacated and a new trial ordered."

The available grounds upon which the Government might justify this appeal under Title 23, Section 105, D. C. Code (1940), thus are limited to argument that the order of suppression was a final ruling, not made "during a trial", which argument assumes that the motion to suppress, filed heard and determined after indictment, is a separate proceeding. It is difficult to understand how criminal number 1556-50 became two proceedings upon the filing of a motion to suppress—one criminal and one civil. Analogizing, it would appear that one apple would become two when it was cut into pieces. Of course, this is an absurdity, and it would appear that the Government's position is equally as absurd for all of the pieces of the apple constitute the whole.

While the Government's appeal may have some similarity to *Burdeau* v. *McDowell, supra; United States* v. *Bianco,* 189 F. 2d 716; *Go-Bart* v. *United States,* 282 U. S. 344; and *Perlman* v. *United States,* 247 U. S. 7, in that they were concerned with the suppression of evidence, these proceedings were all instituted before indictment, and it does not appear that other federal Courts have approved the procedure here followed. These decisions are therefore no precedents for the ruling in the case at bar, and to slide from these decisions to a right of appeal in a criminal case for the Government on an order of suppression without specific statutory authority is contrary to the history

underlying the Government's right of appeal in a criminal case. While Title 23, Section 105, District of Columbia Code (1940 Edition), purports to give the Government a right of appeal similar to that of the defendant, it does not purport to give the Government a right of appeal from interlocutory orders. In fact, Title 17, District of Columbia Code (1940 Edition), §102, denies the existence of any such right in either the United States Government and/or the District of Columbia Government. This section of the District of Columbia Code [1] bears some similarity to 18 U. S. C. §683.

There is a conflict among the circuits as to the appealability of an order of suppression by the Government. *United States* v. *Rosenwasser,* 145 F. 2d 1015 (C. A. 9th) and *Janitz* v. *United States* (C. A. 3rd), *supra,* hold that the United States has no right of appeal from an order of suppression. The holding in the instant case is the only decision which counsel for petioner have found which holds that the Government has a right of appeal from an order of suppression in a criminal case after indictment.

It is difficult to comprehend how the United States may appeal from an order of suppression entered after indictment since such an order amounts to no more than a ruling that, if certain testimony be offered by the Government, it will be rejected, and is equivalent to a ruling during the progress of the trial. The above reasoning would appear to be persuasive for the position of the United States herein "is no less favorable than in the usual case of an adverse ruling on a point of evidence during a crim-

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[1] § 17-102 [16:27]. Court of Appeals—Appeals from interlocutory orders in criminal cases prohibited.

Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain any such appeal heretofore or hereafter allowed or taken. (July 3, 1926, 44 Stat. 831, ch. 755.)

inal trial, from which ruling the Government would have no immediate, and possibly no future right of appeal''. See *United States* v. *Rosenwasser,* 145 F. 2d 1015 (C. A. 9th).

Finally, the Court of Appeals bottomed its conclusion that the order of suppression after indictment was a final decision upon three decisions of this Court, namely, *Cohen* v. *Beneficial Industrial Loan Corp.* 337 U. S. 541, *Swift Co.* v. *Compania Colombiana Del Caribe, S. A.,* 339 U. S. 684, and *Stack* v. *Boyle,* 342 U. S. 1. In the *Cohen* case, this Court determined the appealability of a motion to require plaintiff to give security for the reasonable expenses of the suit, including counsel fees. In the *Swift* case, this Court determined the appealability of an order vacating an attachment. In *Stack* v. *Boyle,* this Court determined the appealability of an order denying a motion to reduce bail. The *Cohen* and *Swift* cases present problems totally dissimilar to the case at bar inasmuch as the *Cohen* case was a stockholder's derivative suit and the *Swift* case was a suit in admiralty. *Stack* v. *Boyle* was a habeas corpus proceeding in which this Court discussed the appealability of an order denying the motion to reduce bail.

The difference between the denial of a motion for security in a civil case and the granting of an order of suppression of evidence in a criminal case is apparent. Apart from the fact that the two proceedings are entirely different in character and scope, it would appear that a motion for security is separable from and collateral to the main proceeding inasmuch as a motion for security is not an ingredient of the cause of action and does not require consideration with it. However, the motion to suppress is an essential ingredient of the trial. What has been said with respect to the *Cohen* case applies with equal force to the *Swift* case, in which this Court reversed an order of the district court vacating a foreign attachment, although the rule appears to be different where an attachment is upheld

pending determination of the principal claim, *Cushing* v. *Laird*, 107 U. S. 69.

In *Stack* v. *Boyle, supra,* the denial of a motion for reduction in bail is appealable as a final decision under 28 U. S. C. 1291, not only because the right to reasonable bail is a useless one if not promptly requested, but also it is separable from the trial in that release upon bail does not interrupt the orderly progress of the trial. The case at bar presents a different problem in that the granting of an order to suppress after indictment is actually an evidentiary ruling affecting the trial.

Point Two

Petitioner submits that the Court of Appeals erred in holding that the search and seizure was legal under the doctrine of *Carroll* v. *United States*, 267 U. S. 132, *Scher* v. *United States*, 305 U. S. 251 and *Brinegar* v. *United States*, 338 U. S. 160.

There is no dispute that the petitioner was arrested upon the streets of Washington, D. C., in the 1200 block of Thirteenth Street, Northwest (R. 6). After his arrest and search, petitioner disclosed the tag number of the license plate on his automobile, H-81832 (R. 9), and it was found and searched by other officers at Fourteenth Street and Thomas Circle without petitioner's permission, and without a search warrant.

Petitioner submits that the search and seizure herein are not controlled by the doctrine of the *Carroll, Brinegar* and *Scher cases.* All of these cases presented situations of a moving vehicle which actively engaged in some unlawful activity. In the case at bar, the petitioner was arrested and searched several blocks distant from the location of the automobile. Surely, then, it would appear that there was no reasonable grounds to believe that the automobile would be

removed prior to the time that the officers could secure a search warrant inasmuch as the petitioner was in custody.

Petitioner contends that the Court of Appeals misapplied the *Carroll, Brinegar* and *Scher* cases. It is submitted that the search of the automobile here is controlled by *Agnello* v. *United States,* 269 U. S. 20, 30-31, 70 L. Ed. 145, 148, 46 S. Ct. 4, where this Court said:

> ". . . The legality of the arrests, or of the searches made at the home of Alba, is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. *But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrests. Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 391, 64 L. Ed. 319, 321, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182; *People v. Conway* 225, Mich. 152, 195 N. W. 679; *Gamble v. Keyes,* 35 S. D. 645, 650, 153 N. W. 888" (Emphasis Supplied).

While the *Agnello* case was concerned with the search of Agnello's house after his arrest at the home of Alba, this case presents the search of an automobile after petitioner had been arrested upon the public streets. Here, as in the *Agnello* case, at the time the officers searched the petitioner's automobile, petitioner was in custody and his criminal conduct had ended.

Petitioner submits that the determination of the District Court in granting his motion to suppress was correct and that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed on the basis of *Agnello* v. *United States, supra.*

Point III

At the trial of the case, the United States Attorney tacitly conceded petitioner's ownership of the motor vehicle, but urged that petitioner must allege ownership in order to invoke the exclusionary rule.

> The Court: You say he isn't the owner?
> Mr. Sommer: I don't take that position, Your Honor, I say that it is up to the defendant to allege he is the owner. (R. 5.)

Judge Learned Hand in *Connelly* v. *Medalie*, 58 F. 2d 629, 630 very aptly stated,

> ". . . Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possession, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament, but they were obliged to choose one horn of the dilemma."

In the instant case, the petitioner comes as a victim and did make a choice.

The motion for purposes of the exclusionary rule invoked, clearly showed possession in the petitioner, ". . . That on to wit: September 23, 1950 defendant (petitioner) was possessed of a certain motor vehicle commonly known as an automobile . . ." (R. 5, 12).

On this issue, the Court of Appeals made this comment:

> "The Government says Appellee did not claim any interest in the cab or the drugs and therefore cannot complain of the search and seizure. This point is somewhat technical. We need not consider it since the government's other contentions, with which we agree, require reversal of the court's order." (R. 16, 17.)

But even so, the opinion and holding of the Court of Appeals is contrary to prior decisions of this Court and cannot stand. The trial court correctly granted the petitioner's motion to suppress.

The contention of the government is certainly erroneous in the light of *United States* v. *Jeffers*, — U. S. —, 96 L. Ed. 53, 57, where this Court held, 'Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.", which is precisely the position the trial court took in the case at Bar. Certainly, petitioner's position here is as strong as that of Jeffers.

As Circuit Judge Fahy observed in the Jeffers case, 187 F. 2d 498, 501, "We believe the correct rule to be that one who seasonably objects to the use in evidence against him of property he owns which has been seized as the fruit of an unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion though the premises searched were not his. He is a 'victim' of (Goldstein *v.* United States, supra 316 U. S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312), and aggrieved by (Rule 41(e) supra) the violation of the Fourth Amendment. To deny him standing to object would be inconsistent with the purpose of the exclusionary rule to make the Amendment effective; for it condemns unreasonable seizures as well as unreasonable searches and applies to 'effects' as well as to 'houses'." At page 503 the court says, "For purposes of standing to object to its admission in evidence, appellant was the owner of the property."

In commenting upon the recent *Rabinowitz* case", Judge Edgerton points out in *McKnight* v. *U. S.*, 183 F. 2d 977, 978, "the Supreme Court said: 'The relevant test is . . .

whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case''. *United States* v. *Rabinowitz,* 339 U. S. 56, 66, 70 S. Ct. 430, 435, 94 L. Ed. 653, 660.

Conclusion

In view of the conflict of decisions and the obvious importance of settling this question of the Government's right of appeal from an order of suppression, it is prayed that this Court grant the writ and hold (1) that the Government has no right of appeal and (2) that the search and seizure were illegal and unlawful.

B. Dabney Fox,
William Beasley Harris,
Counsel for Petitioner,
1901 Eleventh Street, N. W.,
Washington 1, D. C.,
ADams 4-3233.

Curtis P. Mitchell,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 534

ANTHONY A. CEFARATTI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM SUGGESTING THAT THE PETITION FOR A WRIT OF CERTIORARI IS OUT OF TIME

Petitioner was indicted in the District Court for the District of Columbia on four counts, charging the sale, purchase and concealment of narcotics (R. 11-12). A motion to suppress evidence obtained under an allegedly unauthorized search and seizure was granted on November 10, 1950, rehearing denied December 1 (R. 10, 13-14).

On December 7 the Government was granted leave to, and did dismiss counts 3 and 4 of the indictment, since the granting of the motion to suppress left the Government with no evidence under which to proceed (R. 10, 14).

On appeal by the Government from the order suppressing evidence, the Court of Appeals reversed and remanded the case on November 6, 1952 (R. 25).[1] The petition for a writ of certiorari was filed January 5, 1953.

In his petition for a writ of certiorari, petitioner cites only 28 U.S.C. 1254 (1) as the basis for jurisdiction (Pet. 1), but argues that there was no right of appeal by the Government since the proceeding was in a criminal case. The appeal was clearly in the criminal case. It is well established that a motion after indictment to suppress evidence to be used in a trial under the indictment is a motion in the criminal proceeding. *United States* v. *Wallace and Tiernan Co.*, 336 U.S. 793, 802; *Cogen* v. *United States*, 278 U.S. 221, 227-228. Indeed had the motion not been deemed in the criminal case, there would have been no issue as to the government's right to appeal, for orders in independent proceedings for the return of property alleged to have been illegally seized have

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[1] A motion by petition for an extension of time from November 21 to December 8, in which to file a petition for a rehearing, was denied by the Court of Appeals on December 3, 1952 (R. 26-28).

long been treated as appealable by either the movant or the government. *Burdeau* v. *McDowell,* 256 U.S. 465; *Go-Bart Co.* v. *United States,* 282 U.S. 344. The court below considered the order final, just as an order dismissing an indictment is final, but this does not take the order out of the criminal case. Hence the petition for a writ of certiorari should have been filed within 30 days after the judgment of the Court of Appeals on November 6, 1952, or an extension of time to file should have been obtained within that time. Rule 37 (b) (2), F. R. Crim. P. Petitioner has done neither. Consequently, the petition should be dismissed as out of time.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

FEBRUARY, 1953.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 534

ANTHONY A. CEFARATTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITIONER'S REPLY BRIEF ON JURISDICTION

B. DABNEY FOX
WILLIAM BEASLEY HARRIS,
1901 Eleventh Street, N. W.
Washington 1, D. C.

CURTIS P. MITCHELL
Washington, D. C.
Of Counsel for Petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITIONER'S REPLY BRIEF ON JURISDICTION

Opinion Below

The opinion of the Court of Appeals on respondent's appeal is not yet reported, but can be found in Record 15, et seq.

Jurisdiction

The judgment of the Court of Appeals was entered on November 6, 1952, (R. 25). The jurisdiction of this Court is invoked under Title 28, United States Code, 1254(1), and Title 28, United States Code, 2101(c).

Statutes Involved

The issue thus raised is to be determined with reference to Sections 1254(1), 2101(c), of Title 28 of the United States Code; Rules 37(b) (2) and 45(e) of the Federal Rules of Criminal Procedure; and Rule 26(a) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit. The relevant portions of those Sections and Rules are as follows:

Title 28, United States Code, 1254.

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28, United States Code, 2101(c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Federal Rules of Criminal Procedure, Rule 37(b)(2)

Time of Making Petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period. As amended Oct. Term, 1948, effective January 1, 1949.

Federal Rules of Criminal Procedure, Rule 45(e)

ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

General Rules of the United States Court of Appeals for the District of Columbia Circuit, Rule 26(a).

PETITION. A petition for rehearing may be filed with the Clerk, when accompanied by proof of service on the adverse party, within fifteen days after judgment or decision, unless the time is shortened or enlarged by the court or a judge thereof. Such petition must be printed and signed and forty copies thereof furnished. It must briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, unless ordered by the court.

Questions Presented

(1) Was the time of petitioner within which to apply for a writ of certiorari extended when his motion for an extension of time in which to file petition for rehearing was denied on December 3, 1952 and notice thereof by mail was received on December 6, 1952, by virtue of Rule 45(e) of the Federal Rules of Criminal Procedure.

(2) Where a Court of Appeals treats an appeal by the United States from an order of suppression after indictment as a civil appeal, does the case then become a civil appeal for purposes of certiorari?

Summary of Argument

The contested issues for the Court of Appeals related to (1) the right of the Government to appeal from an order

of suppression after indictment and (2) the legality of the search and seizure.

On November 6, 1952, the Court of Appeals handed down its opinion holding that the Government had an appeal from an order of suppression in a criminal case after indictment and reversing the order of suppression.

On January 5, 1953, petitioner filed a petition for a writ of certiorari in this Court under Title 28 United States Code, 1254(1). Inadvertently, petitioner omitted to include Title 28, United States Code 2101(c). In the month of February 1953, respondent filed a memorandum suggesting that the petition for a writ of certiorari is out of time.

Petitioner submits that this Court has jurisdiction to entertain his petition for a writ of certiorari as a criminal appeal because notice of the order denying his extension of time to file petition for a rehearing in the Court of Appeals was not received until December 6, 1952, and Rule 45(e) of the Federal Rules of Criminal Procedure allows him an additional three (3) days to exercise a right or to perform an act when service is had upon him by mail.

Petitioner further submits that the Court of Appeals treated the Government's appeal as an appeal from an order of suppression before indictment and ignored the fact that the dismissal of the indictment by the Government was without prejudice to its declaration that it proposed to reindict petitioner if it was successful. Under these circumstances, petitioner believes that the appeal was a civil one and that he had ninety (90) days in which to petition this Court for certiorari under Title 28, United States Code, Section 2101(c).

Statement

Petitioner was arrested on September 23, 1950 and was indicted on October 16, 1950 for a violation of the Federal Narcotics Law (United States Code) Title 21, Section 174,

Title 26, Sections 2553(a) and 2554(a). The first two counts of the indictment charged a sale and concealment of twenty-five capsules of heroin on September 21, 1950. In the last two counts, he was charged with the purchase and concealment of ninety capsules of heroin on September 23, 1950.

The facts leading to the petitioner's arrest on September 23, 1950 as adduced at the hearing on the motion to suppress the evidence filed under Rule 41(e) of the Federal Rules of Criminal Procedure and based upon the fourth and fifth amendments to the Constitution of the United States, are as follows:

On September 21, 1950, Officer Joseph A. Gabrys of the Washington Metropolitan Police Department observed from the second floor of the Austin-Reynolds Printing Company which is at the rear of 1318 Twelfth Street, Northwest, a meeting in the rear of 1315 Thirteenth Street, Northwest, between one Harold Hallams, the informer named as the vendee in the first count of the indictment, and the petitioner Cefaratti. At that time he (Gabrys) witnessed a sale between the two which turned out to be heroin. There is no evidence that either Gabrys or Hallams knew the name of the defendant at the time of the sale of September 21 (R. 6). Pursuant to instruction from the Narcotics Squad Hallams made arrangements to meet the same man, identifed by name as Cefaratti after his arrest, at a specified hour on the Northwest corner of Thirteenth and "M" Streets, Northwest, on September 23, 1950, and to buy from him some narcotics drugs (R. 6, 7). This communication Hallams communicated to Gabrys (R. 6, 7). Hallams also had informed Gabrys that the man from whom he had made a purchase owned a cab (R. 8-9).

Accordingly, at the "arranged time" on September 23, 1950, Hallams was stationed on the Northwest corner (R. 8). Hallams met the petitioner at the "arranged time and

place", but did not purchase the narcotics because the police had not given him any money inasmuch as they (the police) intended to arrest the petitioner at this time. The petitioner was arrested in front of 1216 Thirteenth Street, Northwest, Washington, D. C. (R. 6), and searched. Upon learning the tag number of petitioner's car, some other officers found the car at or near Fourteenth Street and Thomas Circle, Northwest, and searched it, removing therefrom some papers and narcotics (R. 6). Officer Gabrys further testified that he searched the car when it was brought to Police Headquarters (R. 6).

The trial court granted the motion to suppress on November 10, 1950, but did not order the return of the property (R. 10). The Respondent filed a Motion for Reconsideration on November 15, 1950 (R. 13), which was denied without argument on December 1, 1950 (R. 14). On December 7, 1950, the Respondent dismissed counts three and four of the indictment (R. 14), and appealed to the United States Court of Appeals for the District of Columbia Circuit from the order suppressing the evidence. The Court of Appeals reversed the order of the District Court on November 6, 1952, treating the appeal by the United States as an appeal from an order to suppress before indictment (R. 20-21).

ARGUMENT

As a Criminal Appeal, the Motion for Extension of Time in in Which to File Petition for Certiorari Was Timely and Should Have Been Presented to the Court for Consideration.

The respondent has filed a Memorandum Suggesting that the Petition for a Writ of Certiorari is Out of Time. In this regard, petitioner was indicted in the United States District Court for the District of Columbia on four counts charging the sale, purchase and concealment of narcotics.

(R. 11-12). A motion to suppress evidence obtained by an alleged unreasonable search and seizure was granted on November 10, 1950, and rehearing or reconsideration of this order was denied December 1, 1950. (R. 10, 13-14). When the case was called for trial, the Government was granted leave to, and did dismiss counts 3 and 4 of the indictment (R. 10, 14.).

On appeal by the Government from the order suppressing evidence, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case on November 6, 1952. (R. 25).

A timely motion[1] for an extension of time, in which to file a petition for rehearing, from November 21, 1952 to and including December 8, 1952, was filed by the petitioner on November 21, 1952. This motion was denied by the Court of Appeals on December 3, 1952 (R. 26-28). However, notice of the entry of such order was not received until December 6, 1952, at which time present counsel were engaged by principal counsel in the Court of Appeals to present a Petition for Certiorari to this Court. Present counsel are making their first appearance in this Court and have acted promptly and without delay. In this connection present counsel presented a motion for extension of time within which to file petition for certiorari on the morning of December 8, 1952 to Mr. *Edmund P. Cullinan, Assistant Clerk of this Court.* Mr. Cullinan informed counsel that the motion was out of time.

Rule 37(b)(2) of the Federal Rules of Criminal Procedure provide as follows:

> "Petition for writ of certiorari may be made within 30 days after entry of judgment or within such further

[1] Rule 26(a) of General Rules of the United States Court of Appeals for the District of Columbia Circuit.

time not exceeding 30 days as the Court or a justice thereof for cause shown may file within the 30-day period following judgment" . . .

Rule 45(e) of the Federal Rules of Criminal Procedure provides:

> "Additional Time After Service by Mail. Whenever a party has the right to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period."

If three days for service by mail (Rule 45(e)) were added to the 30-day period provided by Rule 37(b)(2) as time of making petition for certiorari, the motion for an extension of time in which to file petition for certiorari was presented in time on December 8, 1952.

Petition for Writ of Certiorari Is Timely for the Reason That This Appeal Was Treated as a Civil Appeal by the Court of Appeals.

The Court of Appeals thought that the problem presented by this appeal was new.

> "The precise question we have is apparently new. However, it is settled that not only an order granting *Burdeau* v. *McDowell*, 265 U. S. 465, *United States* v. *Branco*, 3d Cir., 189 F. 2d 716, but even an order denying, *Go-Bart Co.* v. *United States* 282, U. S. 344, *Perlman* v. *United States*, 247 U. S. 7, a motion made before indictment, to suppress evidence is final and appealable. Since the appellee was not under indictment when the appeal was filed and is not under indictment now, the present appeal has a good deal of resemblance to the appeal in the *Burdeau* case. However, our decision rests squarely on the *Cohen*, *Swift*, and *Stack* cases." (R. 20-21).

Thus it would appear that the Court of Appeals converted the respondent's appeal into a civil appeal inasmuch as the petitioner was not under indictment at the time the appeal was filed. Moreover, it appears that "resemblance" became a fact and the appeal *ipso facto* became a civil appeal.

Respondent now argues that this case presented a clear instance of an appeal by the Government in a criminal case. In its brief below, the Government states at page 16:

> ". . . In the case at bar, the United States is in precisely the same circumstances it was in in *Burdeau* v. *McDowell, supra.* No indictment is in existence against appellee. The Government has in its possession incriminating evidence against defendant which "in grand jury" will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned". In the instant case, the order of the District Court, pursuant to Rule 41 (e), renders the evidence inadmissible 'at any hearing or trial', just as the order in *Burdeau* v. *McDowell, supra,* rendered the evidence inaccessible to the Government by ordering its return. In principle, there is no distinction between the two cases."

This clearly presents a different point of view from that now put forward by the respondent. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, and *Burdeau* v. *McDowell,* 256 U. S. 465, represent petitions for suppression filed before indictment. Interestingly enough both the opinion of the court below and the Government's memorandum proceed upon a discussion of the *Go-Bart and Burdeau* cases.

Petitioner submits that the court below treated this case as a petition for suppression of evidence before indictment, and inasmuch as it was so treated that he had ninety (90) days within which to petition this Court for certiorari under

the provisions of the United States Code, Section 2101(c). Thus it would appear that his petition is timely.

Conclusion

The petitioner submits that the Petition for a Writ of Certiorari is timely and should be granted.

Respectfully submitted,

B. Dabney Fox
William B. Harris,
Counsel for Petitioner
1901 Eleventh Street, N. W.
Washington 1, D. C.

Of Counsel:

Curtis P. Mitchell,
Washington, D. C.